to act as a cowherd because his disability prevented him from milking them or cutting grass for cattle fodder. His children helped him to tend the cattle. He added that he could not get a job elsewhere as a cowherd because his weakened leg would not enable him to run after any cattle which might stray. Even when he put his own cattle to graze he had to be accompanied by his son.

From the sale of milk he obtained an income of $200 per month.

Mr. Marjoribanks for the appellants and Datuk Morris Edgar for the respondent both share the view that what the trial judge held to be "loss of future earnings" should really be "loss of earning capacity". Mr. Marjoribanks cited the decision of this court in *Rasidin bin Partorjo* v. *Frederick Kiai*[1] wherein this court cited with approval a passage which appears in *Kemp & Kemp* 4th Edition at pages 121 and 122 which reads:

"There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it cannot act on mere speculation. If there is no satisfactory evidence of future loss of earnings, but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for future loss of earnings."

However it is plain that the learned trial judge found that there was satisfactory evidence of future loss of earnings. He found that on the evidence the loss was at the rate of $150 per month, and took as a multiplier the figure of 12, reasoning that at the age of 40-41 respondent had a working life as a lorry driver of between 15 and 20 years. He had halved the monthly income of the respondent from his cattle because he found that that sum was family income and not that of the respondent alone. With respect I am inclined to agree with the learned judge that this is a case where there is indeed satisfactory evidence of loss of future earnings and there is no need for the court to resort to "plucking a figure from the air".

Bearing in mind the principle upon which an appellate court will interfere with the award of damage made by a judge sitting alone as enunciated by Lord Wright in *Davies & Anor.* v. *Powell Duffryn Associated Collieries, Limited,*[2] I do not think I should interfere with the award though I myself might not have taken a multiplier as large as 12. The appeal is therefore dismissed with costs.

Lee Hun Hoe C.J. (Borneo) and **Chang Min Tat F.J.** concurred.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Morris Edgar & Co.*

LOW KUM YOON v. TEH KIM HUAH

[O.C.J. (Arulanandom J.) July 5, 6 and September 26, 1977]
[Penang — Originating Summons No. 303 of 1977]

Landlord and Tenant — Controlled premises — Expiry of lease — Tenant holding over — Premises decontrolled by effluxion of time — Effect of — Whether notice to quit necessary to determine tenancy — Control of Rent Act, 1966, s. 23(1) — Specific Relief Act 1950, s. 8 — R.S.C. 1957, O. 54.

Practice and Procedure — Declaratory judgment — Power to make — Exercise of discretion — Issue of title.

By an agreement in writing dated January 1, 1973 the defendant, as chief tenant let out the premises to the plaintiff for a fixed term of three years from January 1, 1973 to December 31, 1975 at a daily rental of $10 to be paid daily. On December 17, 1975 the defendant wrote to the plaintiff that the lease for a fixed term would be expiring on December 31, 1975, and requesting the plaintiff to quit and deliver vacant possession of the demised premises on December 31, 1975. The plaintiff failed to comply with the request to quit as he had been advised that as the premises were under the purview of the Control of Rent Act 1966 he was protected. On January 13, 1976 the plaintiff applied to have the premises decontrolled by effluxion of time in accordance with the written agreement between the parties. On April 2, 1977, the Chairman for the Rent Tribunal issued a certificate certifying that pursuant to section 23 of the Control of Rent Act 1966 the tenancy of the said premises had been duly delivered and that on the service of a copy of the said certificate on the plaintiff the said premises were decontrolled. The certificate was duly delivered on the defendant and on May 19, 1977 the defendant took possession of the said premises. The plaintiff applied for a declaration that although the said premises were decontrolled, he was still the lawful sub-tenant and was entitled to possession of the demised premises.

Held: (1) once premises under the purview of the Act were decontrolled, the premises reverted to the state of non-controlled premises and the ordinary common law relating to landlord and tenant would apply. Hence, the tenant's right to remain on the premises having been determined by the expiry of the period of his lease, he was not in a position to demand a lawful notice to quit to determine his tenancy as his lease had already been determined;

(2) the concept of statutory tenancy which existed in the Control of Rent Ordinance of 1948 and 1956 had disappeared from the Control of Rent Act of 1966. The deletion of the provisions regarding statutory tenancy left a tenant who held over after the determination of his tenancy by effluxion of time with no protection whatsoever when the certificate decontrolling the demised premises was served on him;

(3) after the determination of the tenancy any act of the landlord showing an intention to take possession was sufficient to revest possession in him so that the tenant became a respasser;

(4) the power to make declaratory judgments was a discretionary one which should be exercised with care and caution and granted sparingly and judicially with regard to all the circumstances of the case. The court would not make a declaratory judgment where the question raised was purely academic or where the purpose of seeking a declaration was to cause delay;

(5) the plaintiff was not entitled to the declaration that he sought as not only did the circumstances not warrant the exercise of discretion in his favour but to declare he was the lawful sub-tenant would be contrary to law. Section 8 of the Specific Relief Act only referred to possession and did not deal with issues of title.

Cases referred to:-

(1) *Henderson* v. *Squire* (1869) L.R. 4 Q.B. 170, 172.

(2) *Howard* v. *Pickford Tool Co. Ltd.* [1951] 1 K.B. 417, C.A.

(3) *Vine* v. *National Dock Labour Board* [1956] 1 All E.R. 1, 8, 13.

(4) *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118, 121.

ORIGINATING SUMMONS.

Tan Boon Im for the applicant.

Gan Teik Chee for the respondent.

Cur. Adv. Vult.

Arulanandom J.: This is an application by the plaintiff: —

"(1) For a declaration that he is still the lawful sub-tenant of the defendant in respect of the downstairs front portion of No. 27 Kuala Kangsar Road, Penang (hereinafter referred to as the demised premises).

(2) That the defendant do forthwith allow the plaintiff to continue occupying the demised premises.

(3) Damages for having locked out the plaintiff by the defendant from the 19th day of May, 1977 until the plaintiff is let into possession of the demised premises.

(4) For such further or other relief as shall be just.

(5) That the defendant may be ordered to pay the costs of this application."

The brief facts of the case are as follows. The defendant is the chief tenant of the said premises and by an agreement in writing in Chinese dated the 1st day of January, 1973 the whole of the front portion of the said premises (hereinafter referred to as the demised premises) was let out to the plaintiff for a fixed term of three years from the 1st day of January, 1973 to the 31st day of December, 1975 at a daily rental of $10 to be paid daily and with other terms and stipulations therein.

On the 17th of December, 1975 the defendant wrote to the plaintiff that the lease for a fixed term would be expiring on December 31, 1975 and requesting the plaintiff to quit and deliver vacant possession of the demised premises on December 31, 1975.

The plaintiff failed to comply with the request to quit as he had been advised that as the premises were under the purview of the Control of Rent Act, 1966 he was protected.

The plaintiff hence ignored the defendant's letter of December 17, 1975.

On the 13th of January, 1976 the defendant filed an application in the Rent Tribunal State of Penang being Application No. 7 of 1976 to have the demised premises decontrolled by effluxion of time in accordance with the written agreement between the parties in Chinese and on the 2nd day of April, 1977 the Chairman for the Rent Tribunal Penang issued a certificate certifying that pursuant to section 23 of the Control of Rent Act, 1966 the tenancy of the said demised premises had been duly delivered and that on the service of a copy of the said certificate on the plaintiff the said premises were decontrolled.

The defendant duly served the certificate on the plaintiff.

On the 19th day of May, 1977 at about 4 p.m. in the absence of the plaintiff, his servants or agents, the defendant peaceably re-entered the demised premises and took possession.

Attempts by plaintiff to re-take possession of the demised premises were resisted by the defendant.

The plaintiff is of the opinion that although the demised premises were decontrolled he is still the lawful sub-tenant and entitled to possession of the demised premises. Paragraph 14 of the plaintiff's affidavit affirmed on July 1, 1977 at Penang reads as follows: —

"14. I am advised and verily believe that under the Control of Rent Act 1966 the defendant is entitled to apply for decontrol of the demised premises pursuant to the expiration of the said lease but such Certificate does not entitle the defendant to possession of the demised premises. I am legally the sub-tenant thereof and I am entitled to possession of the demised premises. The defendant has therefore wrongfully locked me out of the demised premises."

Shortly after the defendant re-entered the premises, the defendant sued out a writ against the plaintiff on the 27th of May, 1977 wherein she claimed the following reliefs: —

"(a) An injunction restraining the defendant, his servants or agents from interfering with the plaintiff's possession of the downstairs front portion of premises No. 27 Kuala Kangsar Road, Penang or from attempting to gain entry into the said premises,

(b) Damages for assault and trespass,

(c) Costs,

(d) Further or other relief as the court shall deem fit."

A certificate of urgency was also filed together with a summons-in-chambers on the same date seeking an interim order restraining the plaintiff from interfering with the defendant's possession of the demised premises or attempting to trespass therein.

In reply the plaintiff filed a notice of motion dated June 20, 1977 seeking repossession of the demised premises.

On the 3rd day of June, 1977 the plaintiff also issued out a writ being Civil Suit No. 308/77 against the defendant claiming the reliefs which he substantially seeks in the present originating summons. After filing the writ, he filed a notice of motion seeking the same relief as in his writ.

When the notice of motion came before me in open court on June 14, 1977 and on being informed of the various applications pending before the court on the same subject matter, and on counsel for both parties agreeing that the whole issue would be resolved on the interpretation and construction of section 23 of the Control of Rent Act, 1966 I adjourned the hearing of the application and in order to dispose of the dispute early fixed the 5th of July for the parties to bring the question of construction of section 23 of the Control of Rent Act, 1966 under the provision of Order 54 of the Rules of the Supreme Court, 1957.

As a result the present originating summons was brought before the court on July 5, 1977 but as the defendant's counsel required time to file his reply the matter was adjourned to July 6, 1977.

At the outset it was agreed between the parties that the decision in this summons will determine the issues in Civil Suit 294/77 and Civil Suit 308/77 as the parties would abide by the result of this decision.

Counsel for plaintiff argued that the notice of December 17, 1975 was bad as a notice to quit and it did not fall within the purview of Part IV of the Control of Rent Act which deals with recovery of possession of rent-controlled premises. Counsel argues when a tenant holds over when his lease expires he is still protected by the Act and remains a lawful tenant and cannot be evicted without a proper notice to quit terminating his tenancy and then obtaining a court order to evict him. Counsel also submitted that there is a prohibition of eviction without a court order, relying on *Atkin's* Court Forms 2nd Ed. Vol. 24 p. 123 but in view of the fact that this prohibition

is contained in the 1965 English Rent Acts and not in our Control of Rent Act the statutory provisions of the English Acts cannot be applied to our local cases.

Counsel for defendant submitted that the notice of December 17, 1975 was not a notice to quit determining the tenancy but merely a notice to the plaintiff that the lease would expire by effluxion of time on the 31st of December, 1975 and requesting the plaintiff to deliver vacant possession on the expiry of the fixed period. Counsel concedes that when the period expires the premises are still within the purview of the Control of Rent Act.

But he maintained that once a certificate decontrolling the premises is served on the tenant, he immediately ceases to be a tenant and loses the protection of the Control of Rent Act. With this proposition the court must agree. Once premises under the purview of the Act are decontrolled, the premises revert to the state of non-controlled premises and the ordinary common law relating to landlord and tenant will apply.

Hence his right to remain on the premises having been determined by the expiry of the period of his lease, he was not in a position to demand a lawful notice to quit to determine his tenancy as his lease had already been determined.

Section 23 of the Control of Rent Act, 1966 reads as follows: —

"23. (1) In either of the following events, namely —

(a) where the tenancy of any controlled premises, being a tenancy for a fixed period and other than a monthly tenancy, has been determined either by effluxion of time or by any other means whatsoever; or

(b) where the tenant of any controlled premises for any reason whatsoever surrenders his tenancy either on his own volition or is required by law so to do,

the landlord thereof may apply to the Tribunal requiring the latter to issue a certificate stating either or both of the facts referred to in this subsection, and upon the issue of such certificate a copy thereof shall be served on the tenant.

(2) Upon the service on the tenant of a copy of such certificate, the premises concerned shall forthwith cease to be controlled premises and any person holding on after such cessation shall cease to enjoy the benefits and protection which he would otherwise have enjoyed under this Act but for such cessation."

In the instant case the tenancy being a tenancy for a fixed period has been determined by effluxion of time. Furthermore the landlord has obtained a Certificate of the Rent Tribunal that the tenancy of the demised premises has been determined by effluxion of time, and the section clearly states that when the copy of that certificate is served on the tenant, if he holds on after that, he shall cease to enjoy the benefits and protection which he would otherwise have enjoyed under the Control of Rent Act, 1966.

This section appears for the first time in the Control of Rent Act, 1966. It is not to be found in the Control of Rent Ordinance, 1948. Again, the concept of statutory tenancy which existed in the Ordinances of 1948 and 1956 also disappeared from the Act of 1966. These differences perhaps lead to tenants labouring under a misapprehension of the law as it stands today and some of them, including the plaintiff in this case, consider it imperative for the landlord to obtain a court order for possession as he was bound to do under the old Ordinances of 1948 and 1956. The deletion of the provisions regarding statutory tenancy leaves a tenant who holds over after the determination of his tenancy by effluxion of time with no protection whatsoever when the certificate decontrolling the demised premises was served on him.

After that his rights and obligations, vis-a-vis the landlord are wholly governed by the common law of landlord and tenant. Under the common law the tenant is under an implied contract to restore possession of the demised premises on the determination of the terms of the lease (see *Henderson* v. *Squire*).[1]

As his tenancy has been determined by effluxion of time, the tenant has no right to a notice to quit, as there is no tenancy to determine, unlike the statutory tenant under the 1948 and 1956 Control of Rent Ordinances who was deemed to hold over the tenancy with certain rights as a tenant including a right to a notice determining the tenancy.

After the determination of the tenancy any act of the landlord showing an intention to take possession is sufficient to revest possession in him so that the tenant becomes a trespasser. In the English Common Law a landlord can take possession peaceably without contravening the Statute of Forcible Entry but once he is in possession he can maintain it even if he has to do so forcibly.

But while this may be the common law of England section 8 of the Specific Relief Act, 1950 (Act 137) seems to impose some limitations to the unfettered right of peaceable re-entry into our local law.

Section 8 of the Specific Relief Act, 1950 reads as follows: —

"8. (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.

(2) Nothing in this section shall bar any person from suing to establish his title to any such property and to recover possession thereof.

(3) No suit under this section shall be brought against any Government in Malaysia.

(4) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed."

In *Pollock & Mulla's* commentary on section 6 of the Indian Specific Relief Acts, 1963 which is on all fours with section 8 of our Act, the learned author states as follows (Ninth Edition p. 812 last paragraph): —

"English law permits though it does not encourage a person who is actually entitled to the possession of immovable property (not one who erroneously, however honestly and plausibly, thinks himself entitled) and is out of possession to re-enter without breach of the peace if he can. This concession to self-help was inevitable in days when the superior courts were closed for a great part of the year and twenty miles were counted a long day's journey."

It may be permissible to ask whether in these days of back-logs in court whether such concessions to self-help should be permitted.

However the summons before me is for a declaration — not for possession of the demised premises. The declaration asked for is as follows: —

"(1) For a declaration that the plaintiff is still the lawful sub-tenant of the defendant in respect of the downstairs front portion of No. 27 Kuala Kangsar Road, Penang (hereinafter referred to as the demised premises).
(2) That the defendant do forthwith allow the plaintiff to continue occupying the demised premises.
(3) Damages for having locked out the plaintiff by the defendant from the 19th day of May, 1977 until the plaintiff is let into possession of the demised premises.
(4) For such further or other relief as shall be just.
(5) That the defendant may be ordered to pay the costs of this application."

As far as declaratory judgments are concerned, it is established law that the power to make declaratory judgments is a discretionary one which should be exercised with care and caution and granted sparingly and judicially with regard to all the circumstances of the case. The court will also not make a declaratory judgment where the question raised is purely academic (see *Howard* v. *Pickford Tool Co. Ltd.*)[2] or where the purpose of seeking a declaration is to cause delay (*Vine* v. *National Dock Labour Board*).[3] Singleton L.J. at page 8 says: —

"...The granting of a declaration is discretionary; the discretion is one to be exercised by the judge, and this court will seldom interfere with the exercise of a judge's discretion on such a matter. I feel, however, that the question of declaration was not fully developed before the learned judge, and had it been, I do not think that he would have granted a declaration. There is no reason, so far as I can see it, why damages should not be sufficient remedy for a plaintiff in a case such as this; he has been awarded damages; he desires to keep the declaration. For what purpose? So that he can go back and say to the defendants, 'I am on the pool; now please employ me'? And if they say that they would prefer not to employ him, he may commence an action claiming damages again. He has had the advantage of legal aid in this case in order to bring his claim. It has been a great help to him, I have no doubt; but I do not think that it would be right in the circumstances of this case to prolong the issue between these parties or to give encouragement to fresh proceedings."

Parker L.J. at page 13 says. —

"...I confess that for my part I do not think that a declaration ought to have been granted in this case. It is a discretionary remedy. It is to be granted sparingly,..."

The question to be decided by this court at this stage is whether or not the declaration sought by the plaintiff should be granted and if the granting of the declaration would be equitable and justify the exercising of the discretion in the plaintiff's favour. The circumstances to be considered are as follows. The plaintiff's fixed period of tenancy was determined by effluxion of time on December 31, 1975. He refused to deliver vacant possession for the simple reason that he was protected by the Control of Rent Act, 1966. It was not till the 2nd of April, 1977 that the defendant obtained the certificate under section 23 of the Control of Rent Act, 1966 from the Rent Tribunal and it was not till May 1977 that the certificate was served on the plaintiff. He had thus enjoyed the benefits of the tenancy for fourteen months beyond the expiry of his tenancy and yet he was not prepared to deliver the tenancy or even consider delivering the tenancy of the demised premises to the defendant. An offer to the plaintiff to remain in possession till the end of July 1977 for a fee without the creation of a new tenancy was ignored, the plaintiff insisting that he was still the lawful sub-tenant and entitled to be in possession of the premises *ad infinitum*. If the court exercises its discretion in favour of the plaintiff irrespective of all the circumstances against it, it would only mean a fresh suit instituted against him for ejectment.

In the course of his submission the plaintiff's counsel submitted that the Rent Tribunal's issuance of the certificate was under appeal. It was also conceded that although three months had elapsed since the issuance of the certificate, no notice of appeal has been served on the defendants. Furthermore, the issuance of a certificate is not the result of a judicial decision. Under section 23(1) of the Control of Rent Act, 1966, the Rent Tribunal merely certifies if the tenancy has expired by effluxion of time, which is not denied by the plaintiff. As Ong C.J. said in *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.*[4] about section 23(1) of Control of Rent Act, 1966: —

"As I understand it the section provides that, whenever the tenancy of any controlled premises comes to an end — whether upon expiry or other determination of a lease for a term of years, or, in case of monthly tenancies, upon surrender thereof, voluntary or otherwise — the landlord is entitled, upon application to the rent tribunal at any time, to a certificate of decontrol of the controlled premises. The tribunal, of course, is left no discretion in the matter, since it is *required* to issue such certificate upon proof of the event described in either paragraphs (a) or (b)."

A consideration of the correspondence between plaintiff's solicitors and defendant's solicitors clearly evinces the plaintiff's determination to prolong delivery of vacant possession of the demised premises to the defendant as long as possible, and in the process using the heavy load of work on the courts to assist him by delayed disposal. It is not the duty of the court nor should courts tolerate such attitudes. As Ong C.J. said in the case of *United Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd., supra,* (at page 122) about a case where tenants were abusing their privileges: —

"...This I consider an abuse of rent control legislation, the object of which is to protect sitting tenants against rapacious landlords rather than lend itself to the oppression of landlords by their tenants...."

From all the circumstances of the case it is quite clear that the plaintiff is not entitled to the declaration he seeks as not only do the circumstances not warrant the exercise of discretion in his favour but to declare he is the lawful sub-tenant would be contrary to law. Section 8 of the Specific Relief Act only refers to possession and does not deal with issues of title.

Having found that the court is of the opinion that the second prayer be also dismissed, the originating summons is dismissed with costs.

As it has been agreed that Civil Suit 294/77 and Civil Suit 308/77 would all abide by the decision in this summons, the following orders will also be made:—

Civil Suit 308/77 — Suit dismissed with costs.

Civil Suit 294/77 — Judgment for plaintiff.
Counterclaim dismissed with costs.

Order as set out.

Order accordingly.

Solicitors: *Lim, Lim & Oon; Gan Teik Chee & Co.*